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No. 86-634

In the Supreme Court of the United States

OCTOBER TERM, 1986

SANGUINE, LTD., PETITIONER

v.

UNITED STATES DEPARTMENT OF INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

On a prior appeal in this suit against the Department of the Interior and officials of that Department to challenge a policy affecting petitioner's oil and gas leases of Indian lands, the court of appeals held that nine Indian allottees were entitled to intervene as of right, even though judgment had been entered, because their interests were not adequately represented by the federal defendants. The question presented in the instant petition is:

Whether, after the allottees were permitted to intervene, the district court erred in vacating the judgment that had been entered in the allottees' absence, thereby enabling them to have a meaningful opportunity to litigate various substantive issues in the course of further proceedings in district court or before the Secretary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 798 F.2d 389. The order of the district court (Pet. App. 8a-10a) is not reported. The opinion of the court of appeals on the prior appeal (Pet. App. 17a-27a) is reported at 736 F.2d 1416.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1986, and the petition for a writ of certiorari was filed on October 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an oil and gas exploration company, entered into leases of restricted Indian allotments in western Oklahoma prior to 1981. Each lease granted petitioner the right to drill and extract oil and gas for a specified term of years and as long thereafter as oil and gas

were produced in paying quantities. Pet. App. 19a. The leases were issued pursuant to the Act of March 3, 1909, 25 U.S.C. 396, which authorizes the allottee to enter into such a lease, subject to approval by the Secretary, and authorizes the Secretary to make such rules and regulations as may be necessary to implement the leasing.

Under Section 4 of the Act of May 11, 1938, 25 U.S.C. 396d, oil and gas leases of allotted or unallotted Indian lands

> shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by [the] Secretary prior to or subsequent to the issuance of any such lease * * *.

See also 25 C.F.R. 172.24(c) (1981), recodified at 25 C.F.R. 212.24(c). The most common type of unit-development plan in western Oklahoma is implemented by a communitization agreement. Under such an agreement, all land included within one drilling and spacing unit, as established by the Oklahoma Corporation Commission, is developed as though the land were all under one lease, even though the land in fact may be leased by many different lessees and owned by many different lessors. As a result of communitization, operations conducted anywhere within the unit are deemed to occur on each leased parcel, and production anywhere within the unit will extend the duration of any lease within the unit beyond its primary term. Pet. App. 19a.

On April 10, 1981, the Director of the Anadarko Area Office of the Bureau of Indian Affairs (BIA) announced that communitization agreements submitted for his approval after April 1, 1981 would not be approved unless they included the following provision (Pet. App. 20a):

> All Trust or Restricted Leases committed by this agreement are hereby amended to provide that any

> non-producing zones shall be released at the end of the primary term of said lease.

Under this clause, a lessee who had drilled a well and begun producing oil or gas from one geologic formation or zone within the unit would not be entitled after the end of the primary lease term to produce from any other formations or zones within the unit in which production had not commenced.

2. On July 9, 1981, petitioner brought this action in the United States District Court for the Western District of Oklahoma against the Department of the Interior and various officials of that Department, challenging the Area Director's requirement that the above-quoted provision be included in communitization agreements. On the same day that the complaint was filed, petitioner moved for a preliminary injunction to prevent the application of that requirement to communitization agreements that petitioner proposed to submit for certain leases that were due to expire in August 1981. Following a hearing, the district court entered an order declaring the Area Director's action invalid because: (i) it constituted a "rule" for purposes of the Administrative Procedure Act, 5 U.S.C. 551(4), and accordingly should have been published in the Federal Register for public notice and comment; (ii) the Area Director lacked the authority to promulgate the rule; and (iii) the requirement retroactively modified petitioner's rights under existing leases. The district court also enjoined the defendants from requiring petitioner to use the new lease form and ordered the defendants to approve communitization agreements that petitioner submitted on the prior forms. Pet. App. 20a-21a, 40a-49a.

On August 11, 1981, petitioner and the federal defendants entered into a stipulation that the Area Director's requirement that the communitization agreements release nonproducing zones at the end of the primary term of the lease was invalid as applied to oil and gas leases "in which

[petitioner] owns or hereafter acquires a legal or beneficial interest" and that were approved by the Area Director prior to April 10, 1981. The defendants also consented to the entry of a permanent injunction, which was entered by the district court as a final order on August 11, 1981. Pet. App. 21a, 33a-39a.

3.a. On September 14, 1981, nine members of the Wichita and Affiliated Tribes of Oklahoma (hereinafter the "allottees") who own an interest in restricted lands leased by petitioner filed a motion to intervene in this case as defendants. The allottees contended that they were entitled to intervene as of right under Fed. R. Civ. P. 24(a) because their interests were not adequately represented by the government and that they should in any event be granted leave for permissive intervention under Fed. R. Civ. P. 24(b). Both petitioner and the federal defendants opposed the allottees' motion to intervene. By order dated December 2, 1981, the district court denied that motion (Pet. App. 28a-32a). The district court held that the allottees' motion was timely, but it found that the allottees had failed to demonstrate that their interests were inadequately represented by the federal defendants (*id.* at 31a).

b. On June 15, 1984, the court of appeals reversed the district court's order denying intervention, holding that the allottees were entitled to intervene as of right under Rule 24(a) (Pet. App. 17a-27a). The court of appeals first concluded that the district court did not abuse its discretion in finding the allottees' intervention motion to have been timely. The court reasoned that although petitioner might suffer prejudice as a result of the intervention, since it had entered into communitization agreements and begun drilling on the allottees' land prior to intervention, the allottees would suffer prejudice if they were *not* permitted to intervene. The court also noted that the allottees did not know of their interest in the suit until two weeks after judgment was entered, because the BIA did not

release the names of the affected landowners to the tribal president until August 20, 1981, more than a month after he requested that information. *Id.* at 22a-23a.

The court of appeals next concluded that the allottees had sustained their burden of showing that the government's representation of their interests may have been inadequate. The court stressed that represention is not inadequate for purposes of Rule 24(a) simply because the applicant for intervention and the representative disagree about the facts or law of the case or because the representative enters into a consent decree. But here, the court observed, "the government in effect conceded the case at the outset" (Pet. App. at 24a):

> The government did not file a responsive pleading or brief; at the hearing it called no witnesses and made no significant arguments against [petitioner's] motion [; and] * * * [i]n the consent decree, which was entered only thirty-three days after [petitioner] filed suit, the government stipulated to all of the facts and to the legal conclusions stated in [petitioner's] motion for an injunction. [1]

The court of appeals therefore remanded with instructions to permit the allottees to intervene (*id.* at 27a).

4.a. In accordance with the court of appeals' instructions, the district court, on remand, granted the allottees' motion to intervene (Pet. App. 16a). The allottees then filed an answer and sought relief in their own right: dismissal of petitioner's complaint; a declaratory judg-

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[1] The court of appeals also determined that the allottees satisfied the other requirements for intervention as of right, because they demonstrated that they have an interest in the subject matter of the action (the lands under lease) and that the decree entered in their absence impeded their ability to protect that interest (Pet. App. 25a-26a).

ment that the Area Director's April 10, 1981 requirement for communitization agreements was "legal and proper"; a declaration that the communitization agreements approved by the Area Director pursuant to the district court's order were null and void; and damages in an unspecified amount for losses caused by an alleged breach of contract by petitioner and an alleged breach of trust by the Secretary. The allottees also filed a motion to vacate the preliminary injunction entered on July 20, 1981 and the permanent injunction entered on August 11, 1981. After a hearing, the district court granted the allottees' motion to vacate the injunctions. The court then deferred action on all other pending motions and grounds for relief, including a possible remand of the matter to the Secretary, until petitioner was afforded an opportunity to appeal the order vacating the injunctions (*id.* at 8a-15a).

b. On interlocutory appeal pursuant to 28 U.S.C. 1292(a)(1) and (b), the court of appeals affirmed the district court's order vacating the injunctions (Pet. App. 1a-7a). The court of appeals explained that its holding on the first appeal that the allottees were entitled to intervene as of right was intended to assure the allottees a full hearing on issues affecting their property rights (*id.* at 7a). Unless the prior orders were vacated, the court reasoned, the allottees would not be able to litigate those issues (*id.* at 5a). The court of appeals also distinguished this Court's decisions in *Arizona* v. *California,* 460 U.S. 605 (1983), and *Nevada* v. *United States,* 463 U.S. 110 (1983), observing that, in both of those cases, the Indians' interest had been adequately represented by the government and the Indians were bound by prior judgments entered many years earlier (Pet. App. 6a). By contrast, in the "unique situation" presented here, the government had not actually "litigated" petitioner's challenge to the Area Director's requirement affecting communitization agreements; as a

result, the court concluded, the allottees' interests had not been adequately represented by the government, and they accordingly should not be bound by the judgment entered by the district court in 1981. *Id.* at 6a-7a.

ARGUMENT

The decision of the court of appeals, in what it characterized as the "unique situation" of this case (Pet. App. 7a), is correct and does not conflict with any decision of this Court or another court of appeals. Moreover, the case is currently in an interlocutory posture, because the district court, affirmed by the court of appeals, merely vacated its prior judgment in favor of petitioner in order to permit further proceedings on the merits; the court did not enter judgment in favor of the allottees. Petitoner of course might prevail in the further proceedings contemplated by the district court. But if it does not, and if the court of appeals should affirm a ruling against petitioner, there will be time enough for this Court to grant review—not only of the issue petitioner now seeks to raise, but of any other issues then presented. The petition for a writ of certiorari at this interlocutory stage of the case therefore should be denied.

1. On the previous appeal, the court of appeals held that the allottees' motion to intervene was timely, even though a final judgment had been entered in the case, and that the allottees were entitled to intervene as of right under Rule 24(a) because their interests may not have been adequately represented by the government. Petitioner does not challenge those rulings here. Petitioner challenges only the subsequent order of the district court, affirmed by the court of appeals, that granted the allottees' motion to vacate the injunctions that had been entered before the allottees were granted leave to intervene. But as the court

of appeals observed, the district court's order was essentially compelled by the court of appeals' prior ruling, which petitioner does not contest (Pet. App. 5a):

> if the district court did not vacate its prior orders, of what value is the right of intervention we held exists in this case? Left unaffected, the prior orders resolved the validity and enforceability of the [Area Director's] rule. Yet, these precise issues, we stated [on the prior appeal], were of sufficient interest to warrant intervention.

As the court of appeals further observed, "the government did not contest [petitioner's] challenge of the rule[,] and the issues essential to the intervenors were resolved by consent decree and not adversary litigation" (*id.* at 7a). We note as well that the land in issue is owned by the allottees, subject only to restrictions on alienation, and that the allottees themselves are granted the right to lease the lands under 25 U.S.C. 396. They therefore have a critical interest in vindicating their property rights. In these special circumstances, the courts below correctly concluded that the prior injunctive orders affecting the leases of the allottees' land should be vacated in order to permit the allottees' intervention to be meaningful.

Petitioners nevertheless contend (Pet. 14-16) that the decision by the courts below is inconsistent with the general rule that an intervenor ordinarily cannot challenge any order or decree entered prior to intervention. This general rule gives expression to important principles of finality and judicial economy, but it is not absolute. See *Bryant* v. *Yellen*, 447 U.S. 352, 366-368 (1980).[2] Accord-

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[2] In *Bryant* v. *Yellen*, the respondents before this Court also had been granted leave by the court of appeals to intervene after judgment had been entered by the district court, albeit for purposes of taking an appeal from an adverse judgment that the United States had declined to appeal. See 447 U.S. at 366-368. Thus, the intervenors in *Bryant* v. *Yellen* likewise were not bound by the final judgment, since they

ingly, an intervenor may challenge a prior order or decree if it "would deprive the intervenor of substantial rights which he had not been remiss in pressing." 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.16[5], at p. 24-180 (2d ed. 1985) (footnote omitted). That standard is satisfied here. The court of appeals specifically held on the prior appeal that the allottees' post-judgment motion was timely because they did not previously know of their interests in the case—which refutes any notion that the allottees were remiss in presenting their claims—and that the allottees' interests would not be protected in the absence of intervention.

The decisions upon which petitioner relies stand for the proposition that an intervenor has no absolute *right* to challenge orders and adjudications rendered prior to intervention[3]; they do not hold that a district court in the intervention context is deprived of its *power* under Fed. R.

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were not barred from challenging it on appeal. There is no reason why there should be a different result—*i.e.*, a rule making a prior order absolutely binding on an intervenor—where, as here, the intervenor challenges the order in district court. The allottees in this case, like the intervenors in *Bryant* v. *Yellen*, moved to intervene prior to the expiration of the 60-day period for taking an appeal under Fed. R. App. P. 4(a).

[3] See, *e.g.*, *United States* v. *California Canneries*, 279 U.S. 553, 556 (1929); *Galbreath* v. *Metropolitan Trust Co.*, 134 F.2d 569, 570 (10th Cir. 1943); *Yankton Sioux Tribe* v. *Nelson*, 604 F. Supp. 1146, 1155 (D.S.D. 1985); *Moore* v. *Tangipahoa Parish School Board*, 298 F. Supp. 288, 293 (E.D. La. 1969); *Stell* v. *Savannah-Chatham County Board of Education*, 255 F. Supp. 88, 92 (S.D. Ga. 1966); *United States* v. *The Audrey II*, 185 F. Supp. 777, 782 (N.D. Cal. 1960); *Hartly Pen Co.* v. *Lindy Pen Co.*, 16 F.R.D. 141 (S.D. Cal. 1954). The Court observed in *California Canneries* (279 U.S. at 556-557 n.1) that this principle was embodied in former Equity Rule 37, which provided that proceedings concerning the intervenors' interests were "subordinate" to the main proceeding. However, that provision was deliberately omitted from Fed. R. Civ. P. 24. See 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1920, at 611 (1972). Although the lower court decisions cited by petitioner that were

Civ. P. 60(b) to vacate a prior judgment in appropriate circumstances. While the court's power in this regard is by no means unlimited, it has discretion under Fed. R. Civ. P. 60(b)(6) to vacate a final judgment for "any * * * reason justifying relief." Rule 60(b)(6) permits a court to vacate a judgment "whenever such action is appropriate to accomplish justice." *Klapprott* v. *United States,* 335 U.S. 601, 614-615 (1949) (opinion of Black, J.). The district court did not abuse its discretion in taking such action here, in light of the court of appeals' prior holding that the allottees' motion to intervene after judgment was timely; the apparent absence of notice to the allottees prior to the entry of judgment; and the fact that the validity of the Area Director's rule was not actually litigated, but rather was the subject of a stipulation and consent decree. Compare *Kneeland* v. *Luce,* 141 U.S. 437 (1891).

2. Petitioner also contends (Pet. 10-14) that the court of appeals' affirmance of the district court's order vacating the injunctions is inconsistent with this Court's decisions

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rendered after the adoption of Rule 24 have also precluded the intervenors from challenging prior orders, the omission of the relevant language from Rule 24 surely weighs against the *absolute* rule petitioner urges, under which a court would never have the power to vacate a prior order at the behest of an intervenor. Moreover, in *Galbreath,* the only relevant court of appeals decision cited by petitioner, the court of appeals did recite the principle upon which petitioner relies (134 F.2d at 570); but the actual holding of the case was that the appellant-intervenor did not have a justiciable interest in the controversy (*id.* at 574).

Other cases cited by petitioner have no relevance here. See *Siebring* v. *Hansen,* 346 F.2d 474 (8th Cir.), cert. denied, 382 U.S. 943 (1965) (nonparty to patent infringement suit, who intervened in a contempt proceeding instituted against the losing party, could not attack the underlying judgment because its validity was not at issue in contempt proceedings); *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.,* 46 F. Supp. 346 (D.N.J. 1942) (intervenor's suit considered to have been commenced as of the date of the original action for purposes of determining which of two concurrent suits should be stayed pending the outcome of the other).

in *Arizona* v. *California*, 460 U.S. 605 (1983), and *Nevada* v. *United States*, 463 U.S. 110 (1983). Those cases, however, do not suggest that a court may never grant an Indian's timely motion to intervene in litigation and then permit him to challenge a prior order in the case. There is no reason why Indians should be uniquely disabled in this manner from requesting relief that is otherwise available under Fed. R. Civ. P. 60(b).

In *Arizona* v. *California*, the Court held that Indian tribes for whose benefit the United States held reserved water rights were entitled to intervene in an original action in this Court to adjudicate rights to the waters of the Colorado River. 460 U.S. at 613-615. However, the Court held that, in light of the strong interest in repose, neither the United States nor the tribes were entitled to reopen the question of the amount of practicably irrigable acreage that had been decided by the Court in a decree entered almost 20 years earlier. *Id.* at 615-628. The Court noted that the absence of the tribes as parties at the time of the prior proceedings did not authorize them to relitigate that issue, because the United States, as their fiduciary, had full authority to present the reserved water right claims on their behalf and to bind them in the litigation. The Court specifically found no merit to the contention that the United States' representation of the Indians' interests on the prior occasion was inadequate (*id.* at 627-628), since the government won a "complete victory" for them (*id.* at 617), and that the issues had been thoroughly litigated in the prior proceedings (*id.* at 609-610, 616-617).

This case differs from *Arizona* v. *California* in several critical respects. First, the allotees in this case moved to intervene not many years after the entry of the prior decree, but rather only 33 days after judgment, before the time for taking an appeal had even expired. Second, the court below found on the prior appeal, in a ruling that petitioner does not challenge, that the allottees had made the requisite

showing under Rule 24(a) that their interests with respect to the very issues in dispute may not have been adequately represented by the government (Pet. App. 23a-24a). Third, there was no actual litigation of the critical issues involved in this case, because the government conceded that the Area Director's policy was unlawful and consented to the entry of an injunction against its application (*id.* at 7a).

Petitioner's reliance on *Nevada* v. *United States* is equally misplaced. There, as in *Arizona* v. *California*, the tribe sought to reopen a decree that had been entered many years earlier. Moreover, in *Nevada* v. *United States*, there had been protracted litigation and extended settlement discussions concerning the water rights, and the government affirmatively advanced the interests of the Indians in those endeavors. See 463 U.S. at 117-118. Indeed, the Court cited the district court's finding in that case that the United States had intended on the prior occasion "to assert as large a water right as possible for the Indian reservation" (*id.* at 120), and the Court rejected the notion that the government's representation was inadequate simply because of the conflicting responsibilities imposed on the government in such litigation (*id.* at 128, 135-138 n.15). By contrast, this is not a case in which the United States affirmatively presented claims on behalf of the Indians in prior litigation and in which such claims are now alleged in later proceedings to have been insufficient. The government is the defendant in this suit brought by petitioner, and the government did not present claims on behalf of the Indians or actually litigate the validity of the challenged action; rather, the government stipulated to its illegality.[4] In these circumstances, *Nevada* v. *United States*

[4] The mere fact that circumstances warrant the allottees' intervention to present arguments not advanced by the federal defendants does not establish an actionable breach of fiduciary duty, so long as the government made a reasonable, good-faith determination not to

did not bar the district court's order vacating its prior judgment at the behest of Indians who intervened in a concededly timely manner and prior to the expiration of the time for appealing that judgment.[5]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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contest petitioner's allegations. See *United States* v. *Mason*, 412 U.S. 391 (1973).

[5] Petitioner's reliance (Pet. 8-10) on *Heckman* v. *United States*, 224 U.S. 413 (1912), is misplaced for similar reasons. There, the United States brought suit to cancel the conveyance of allotments by Indians in violation of restrictions against alienation, and the grantee-defendants contended that the United States was required to join the Indian grantees as parties in order to prevent the possibility that the defendants would be subject to inconsistent judgments. The Court rejected the contention that the United States' representation of the Indians was incomplete or inadequate and that the Indians therefore were necessary parties. 224 U.S. at 444-446. *Heckman* does not address the distinct question of when relief may be granted to the affected Indians if they intervene in a timely manner in the suit to which the government is a party and make a particularized showing of inadequate representation.

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